

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 21, 2005

THE CADCO, LLC, ET AL. v. OLIVER A. BARRY, ET AL.

Appeal from the Circuit Court for Sumner County
No. 23858-C C. L. Rogers, Judge

No. M2004-01315-COA-R3-CV - Filed January 18, 2006

Purchaser of real property claimed that the estimated square footage figure provided by seller's real property agent was an actionable misrepresentation and was deceptive under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-104. The trial court granted defendant's motion for directed verdict at conclusion of plaintiff's proof, and we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR. J., joined.

G. Kline Preston, IV, Nashville, Tennessee, for the appellants, The Cadco, LLC and Edgar Vivian Lythgoe.

David B. Scott, Nashville, Tennessee, for the appellees, Oliver A. Barry and Crye-Leike, Inc.

OPINION

In April of 2001, Mr. Edgar Vivian Lythgoe and The Cadco, LLC (collectively "Purchasers") purchased a house in Hendersonville, Tennessee.¹ The real estate agent representing the seller was Mr. Oliver A. Barry, an agent associated with Crye-Leike, Inc., ("Crye-Leike"). The Purchasers allege that after purchasing the house they discovered that Mr. Barry and Crye-Leike had overstated its square footage. While the Multiple Listing Service ("MLS") listing compiled by Mr. Barry provided that the square footage was 3,534 square feet, Purchasers allege it was overstated by 16%, or 500 square feet. Due to the inaccurate representation of square footage, the Purchasers sought to recover from Mr. Barry and Crye-Leike compensatory damages for negligent or intentional

¹ At trial the parties stipulated that Mr. Lythgoe signed the Purchase and Sales Contract, the property was originally deeded to Cadco, LLC with Mr. Lythgoe later acquiring title to the property from Cadco, LLC in 2003.

misrepresentation, punitive damages, and treble damages under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 48-18-104 (“TCPA”), together with attorney’s fees.

A jury trial was held in February of 2004. At the close of the Purchasers’ proof, the trial court granted the motion for directed verdict made by Mr. Barry and Crye-Leike. The trial court found in its order entered February 26, 2004:

After hearing arguments of counsel and reviewing the testimony of the witnesses and the exhibits submitted during the Plaintiff’s proof, taking the strongest legitimate view in favor of the Plaintiff and disregarding all evidence contrary to the Plaintiff’s position, the Court concluded that reasonable minds could not differ that there was no evidence the Defendant made a false statement which could be reasonably relied upon by the Plaintiff and, thus, the Plaintiff’s cause of action for negligent misrepresentation and intentional misrepresentation should be dismissed. The Court further concluded that the Court’s analysis of the Plaintiff’s proof was the same with respect to the Plaintiff’s claims for violation of the Tennessee Consumer Protection Act and that those claims should also be dismissed. . . .

Mr. Lythgoe filed a Motion for a New Trial that was denied by the trial court on May 3, 2004. The Purchasers then filed this appeal.

I. STANDARD OF REVIEW

The standard for review of a directed verdict is well settled. *Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812, 817 (Tenn. Ct. App. 1995). In considering a motion for directed verdict made at the close of the plaintiff’s proof, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.*; *Smith v. Bridgestone/Firestone, Inc.*, 2 S.W.3d 197, 199-2000 (Tenn. Ct. App. 1999) (standard for summary judgment and directed verdict the same). The appeals court should affirm the directed verdict only if reasonable minds could draw but one conclusion. *Harrogate*, 915 S.W.2d at 817.

II. PROOF INTRODUCED AT TRIAL

The basis of Purchaser’s claim was that the square footage in the MLS listing relied upon by them was overstated. At trial, Mr. Barry readily acknowledged that the square footage of 3,534 listed on the MLS listing available to the public was not accurate. Mr. Barry testified that he derived the square footage from the tax records but made a mistake when he provided the square footage information on the MLS listing. The MLS listing introduced at trial provided the following information about the square footage of the house:

Finished Square Feet (est)	
Main	2,356

Second 1,178

Est. Sq. Ft.

Source

Total: 3,534

(emphasis added)

The bottom of the MLS listing contained the following provision:

Information Is Believed To Be Accurate But Not Guaranteed.

Mr. Barry's mistake was that he believed the tax records reflected that the main floor had 2,356 square feet. The tax records used by Mr. Barry provided the following information about the square footage of the house:

Total Area:	2,981	Total Res. Sq. Ft.:	2,356
First Floor:	1,178	Upper Floor:	1,178

Additional Area:

1. Garage Finished 625

The mistaken total square footage is the sum of the total and upper floor square footage found in the tax records - 3,534 square feet. Mr. Barry testified that he did not think the tax records listed the accurate square footage either. In any event, the parties agree that the MLS estimated square footage provided by Mr. Barry and Crye-Leike was excessive.

The house had been on the market for approximately 11 months, and Mr. Barry testified that several potential purchasers had expressed their doubts about the square footage to him. Mr. Barry testified that even though he knew the square footage on the MLS was wrong, he did not change it. Instead, he testified that he told all potential purchasers of the problem. Mr. Barry testified that he warned Mr. Lythgoe that the square footage on the MLS listing was "probably inaccurate." Mr. Lythgoe denied that Mr. Barry gave him this warning, so for the purposes of this appeal, we will proceed as though Mr. Barry gave Mr. Lythgoe no oral disclaimer.

Mr. Barry testified that Mr. Lythgoe had opportunities to measure the house himself or have an independent inspection done. Mr. Lythgoe testified that he had "unlimited access to the property" and chose not to conduct an independent inspection. Mr. Lythgoe, a native of England, is a surveyor which he explained at trial is a type of engineer in this country. His work requires that he deal with measurements and dimensions. Mr. Lythgoe testified that he did not see the need to hire an independent inspector to look at the house since as a surveyor he could do so himself.

Mr. Lythgoe testified the square footage of the house was the primary factor he used in deciding whether to invest in the house. His intent was to renovate the home and then resell it, presumably at a profit. Mr. Lythgoe did not discover the discrepancy in square footage until he was preparing to resell the house. Initially, he used the 3,534 square footage figure, but when he and his realtor measured it, the square footage was approximately 3,028 square feet.

The Purchase and Sale Agreement for the house signed by Mr. Lythgoe contains the following provisions:

Buyer and Seller acknowledge that they have not relied upon any advice, representations, or statements of Brokers and waive and shall not assert any claims against Brokers involving the same.

Buyer and Seller agree that Brokers shall not be responsible to advise Buyer and Seller on any matter, including but not limited to the following: any matter which could have been revealed through a survey, title search, or inspection of the Property; the condition of the Property, any portion thereof, or any item therein; the necessity or cost of any repairs to the Property; hazardous or toxic materials; the tax or legal consequences of this transaction; the availability and cost of utilities or community amenities; applicable boundaries of school districts or other school information; the appraised or future value of the Property; any conditions existing off the Property which may affect the Property; the terms, conditions and availability of financing; and the uses and zoning of the Property whether permitted or proposed.

Buyer and Seller acknowledge that Brokers are not experts with respect to the above matters and that, if any of these matters or any other matters are of concern to them, they shall seek independent expert advice relative thereto.

An addendum to the Purchase and sale Agreement signed by Mr. Lythgoe provides as follows:

Buyer is accepting the subject property in its current “AS IS” condition, and the closing of this transaction will constitute an acknowledgment by buyer that the property, premises, and constructed systems were acceptable at the time of closing.

III. ANALYSIS

The trial court granted the motion for directed verdict on the ground that Mr. Barry and Crye-Leike did not make a false statement upon which the Purchasers could reasonably rely. We will examine the misrepresentation and TCPA claims separately.

a) Misrepresentation Claims

The trial court is correct that whether the claim be negligent misrepresentation,² or intentional misrepresentation,³ the plaintiff must prove as part of its *prima facie* case that the information is incorrect and that it reasonably relied on the incorrect information. *Hardcastle v. Harris*, 170 S.W.3d 67, 82 n.25 (Tenn. Ct. App. 2004).

While the square footage shown on the MLS was not accurate, the MLS listing contained no misrepresentations because the square footage provided was twice expressly designated as an “estimate.” In addition to being designated an estimate, the MLS further expressly provided that the information provided was not guaranteed. Therefore, Mr. Barry and Crye-Leike made no misrepresentations by offering estimated, non-guaranteed figures on square footage.

Further, the Sales Contract specifically informed Mr. Lythgoe and Cadco LLC that they were not to rely on representations by the agent and that Purchasers must conduct their own inspection. Mr. Lythgoe testified that he was given ample opportunity to inspect the premises but chose not to do so because he was relying on his own expertise.

After having thoroughly reviewed the record and taking all evidence and inferences in the light most favorable to Mr. Lythgoe and Cadco, LLC, we must conclude that Mr. Barry and Crye-Leike did not make false statements regarding square footage that were reasonably relied upon by Purchasers supporting a claim for negligent or intentional misrepresentation.

²The elements of a negligent misrepresentation claim are as follows:

- (1) the defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary (as opposed to gratuitous) interest; and
- (2) the defendant supplies faulty information *meant to guide others in their business transactions*; and
- (3) the defendant fails to exercise reasonable care in obtaining or communicating the information; and
- (4) the plaintiff justifiably relies upon the information.

Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997).

³Under Tennessee law, a person is deemed to have made an intentional misrepresentation (or acted fraudulently) if:

- (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and
- (2) another is injured because of reasonable reliance upon that representation.

Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992).

b) TCPA Claim

The TCPA creates a private right of action for “[a]ny person who suffers an ascertainable loss of money or property, real, personal or mixed . . . as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part.” Tenn. Code Ann. § 47-18-109.

Tennessee Code Annotated § 47-18-104(b) lists thirty-six acts or practices that are prohibited because they are deemed to be unfair or deceptive. Thirty-five of those provisions are very specific.⁴ Mr. Lythgoe and Cadco, LLC make the following allegations regarding the TCPA in their complaint:

11. The Plaintiffs aver that this misrepresentation [overestimating the square footage] was an unfair and deceptive trade practice.
- . . .
19. The Plaintiffs aver that the Defendants have violated the Tennessee Consumer Protection Act as found at Tenn. Code Ann. § 47-18-104 et. seq.;
20. The Plaintiffs aver that the Defendants’ actions were unfair and deceptive trade practices and the Plaintiff is a consumer within the meaning of the Act and that the Defendants violated the Act by misrepresenting the quality, condition, and status of the house which is the subject matter of this lawsuit;
21. The Plaintiffs aver that the Defendants knew or should have known the true square footage of the house which had a material effect on the sales price of the house and the reason for the Plaintiffs having purchased the house;
22. The Plaintiffs relied upon the unfair and deceptive trade practices of the Defendants and have sustained damages as a direct and proximate result.

The complaint fails to specify by citation to the statute which provision of the TCPA defendants are alleged to have violated. The allegations in the complaint appear to allege a violation of Tenn. Code Ann. §§ 47-18-104(b)(5), (7), or (21) which provide as follows:

- (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have . . .

⁴The other is a “catch-all” provision and prohibits “engaging in any other act or practice which is deceptive to the consumer or to any other person.” Tenn. Code Ann. § 47-18-104(b)(27). The plaintiffs did not cite to this provision.

(7) Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another.

(21) Using statements . . . in any advertisement which create a false impression of the . . . quality, quantity, . . . size, . . . of the goods or services offered. . . .

The trial court's dismissal of the claim under the TCPA is sustainable on at least two independent grounds. First, for the same reasons discussed above that the estimates were not misrepresentations, the square footage estimates on the MLS listing are likewise not "deceptive" or "unfair." This is true regardless of the grounds relied upon under the TCPA. Mr. Lythgoe chose to rely on a nonguaranteed estimate. He had ample opportunity to verify the figure.

Second, the three provisions of the TCPA that Purchasers appear to rely on involve only "goods and services." "Goods" are defined as "any tangible chattels." Tenn. Code Ann. § 47-18-103(5).⁵ Therefore, alleged misrepresentations regarding real property do not fall within the conduct declared a violation of the TCPA under Tenn. Code Ann. §§ 47-18-104(b)(5)(7), or (21). *See Glanton v. Bob Parks Realty*, No. M2003-01144-COA-R3-CV, 2005 WL 1021559 at *5 (Tenn. Ct. App. April, 27, 2005) (perm. app. denied Oct. 24, 2005).

For these reasons, the judgment of the trial court is affirmed. Costs of the appeal are taxed to the appellants, Vivian Edgar Lythgoe and The Cadco, LLC, for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE

⁵There is no allegation that the nature or quality of any services were misrepresented.